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IN THE

Supreme Court of the United States

OCTOBER TERM, 197...

No. 71-718

PAUL D. McGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J.L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Appellants,

v.

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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IN THE

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No. 71-718

PAUL D. McGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J.L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Appellants,

v.

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

OPINIONS BELOW

The opinion of the three-judge District Court is reported at 332 F. Supp. 973 and appears in the Appendix at p. 53a. The opinion of the single District Judge convening the Three-Judge Court is reported at 327 F. Supp. 1318 and appears in the Appendix at p. 24a.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. §§ 1253 and 2101(a). The order of the District Court was entered on October 15, 1971 and notice of appeal was filed in that Court on November 12, 1971. Appellant's jurisdictional statement was filed on November 29, 1971. Appellees' motion to dismiss or affirm was filed on February 28, 1972. Probable jurisdiction was noted on March 20, 1972.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This cause directly involves the constitutionality of the remission of sentence for good conduct provision of Section 230(3) of the New York Correction Law, in relation to the Equal Protection of the Laws Clause of the Fourteenth Amendment to the Constitution of the United States.

The full text of "Section 230 of the New York Correction Law" along with other relevant provisions of the Correction Law, is printed in the Brief for Appellants, pp. 2-7.

QUESTIONS PRESENTED

1. Whether that portion of Section 230(3) of the New York Correction Law which allows credit for good behavior to be computed upon the minimum term of an indeterminate term of imprisonment less pre-sentence jail time allowance violates the Equal Protection of the Laws Clause of the Fourteenth Amendment to the Constitution of the United States because it distinguishes between

state prisoners who underwent pre-sentence incarceration and those who were not so incarcerated even though both types of prisoners received like terms of imprisonment.

2. Whether the appellees have stated a cognizable claim under the Civil Rights Act over which the Three-Judge District Court had jurisdiction.

STATEMENT OF THE CASE

The statement of the case contained in the Brief for Appellants' is correct, with the exception that the Three-Judge District Court did not reach a consideration of the merits of defendants-appellants' argument that state prisons differ from County Jails with respect to "usage, purpose or availability of facilities" (Appendix, pp. 59a, 61a). Instead the Three-Judge court ruled that whatever distinctions exist between the two entities, such distinctions are not reasonably related to the purpose of Section 230(3) of the Correction Law and consequently do not present a reasonable basis for the distinctions envisioned in that Section (*Id.*).

SUMMARY OF ARGUMENT

Section 230(3) of the New York Correction Law discriminates against state prisoners who were incarcerated prior to being sentenced to an indeterminate sentence of imprisonment. This discrimination is accomplished by that section's provision directing that good behavior reductions on a prisoner's sentence not be computed upon the term of pre-sentence incarceration. The practical effect of this section is to disallow a prisoner so incarcerated prior to sentence from appearing before the Parole Board until several months after a

prisoner not so incarcerated would appear, even though in both situations the prisoners received like terms of imprisonment.

James Royster and Percy Rutherford, who were incarcerated in a County Jail prior to sentence, individually and on behalf of all persons similarly situate, submit that the computation of good time allowance provision of Section 230(3) contravenes and violates the Equal Protection of the Laws Clause of the Fourteenth Amendment to the Constitution of the United States, and respectfully pray that the decision of the Three-Judge District Court, holding the discrimination envisioned within this section unconstitutional, be affirmed for:

1. The aforementioned different treatment of individuals prosecuted pursuant to state penal and criminal procedure laws and receiving like indeterminate terms of imprisonment creates an "invidious discrimination" not rationally based or serving a valid governmental objective. *Dandridge v. Williams*, 397 U.S. 471, 487 (1969); and,

2. The Plaintiff-Appellees in this cause have presented a cognizable claim over which the Three-Judge District Court rightfully had jurisdiction. *Monroe v. Pape*, 365 U.S. 167 (1961); *Cooper v. Pate*, 378 U.S. 546 (1964); *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967).

ARGUMENT

I.

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK CORRECTLY HELD THAT SECTION 230(3) OF THE CORRECTION LAW IS UNCONSTITUTIONAL AS IT VIOLATES THE EQUAL PROTECTION OF THE LAWS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

Section 230(3) of the New York Correction Law draws a distinction between the treatment of state prisoners incarcerated prior to sentencing and those who were not similarly incarcerated. Within the purview of this section are all persons who were charged with the commission of a felony prior to September 1, 1967, arraigned, convicted and sentenced thereon pursuant to the penal laws and criminal procedure laws of the State of New York. While any criminal prosecution brought against individuals so situated is initiated by the state and while the state provides specific procedures to be employed concerning the treatment of persons so charged both prior to and after the imposition of sentence, the State Legislature has created a distinction between persons incarcerated prior to sentence and those who were not similarly incarcerated, notwithstanding the fact that both classes of individuals received like terms of imprisonment.

This distinction is accomplished by the provision in Section 230(3) denying state prisoners good time credit for the period of their pre-sentence incarceration in a County Jail whereas those fortunate enough to obtain bail prior to sentence received a full allowance of good time credit for the entire period which they ultimately

spend in custody in a state prison. The ultimate effect of this distinction is to disallow a prisoner receiving pre-sentence incarceration from appearing before the Parole Board until several months later than a person not similarly incarcerated, even though both prisoners received identical sentences.

If Plaintiff-Appellee Rutherford and Plaintiff-Appellee Royster were to receive good time credit for time spent in County Jail between arrest and sentence, they will be entitled to appear before the Parole Board several months (over four months, in Royster's case;[1] nearly three months in Rutherford's) earlier than they will under the computation required by §230(3).

The distinction is recognized in both the opinion of the Three-Judge Court [Appendix, p. 58a] and the opinion concerning the Three-Judge Court and is readily conceded by the Appellants [Brief for Appellants, pp. 13, 23].

"Such a difference in treatment between person sentenced to state prison for like terms of imprisonment smacks of discrimination on its face" (Opinion of the Three-Judge District Court, Appendix p. 58a). Section 230(3) quite obviously discriminates among individuals; consequently the only issue before the Three-Judge Court was whether the practice envisioned by the statute served a valid governmental objective. *Dandridge v. Williams*, 397 U.S. 471, 486 (1969).

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[1] Royster appeared before the Parole Board and was paroled on August 30, 1971.

A. Good Time Reductions Upon a Prisoner's Sentence Are Not Reasonably Related to Alleged Differences in "Usuage Purpose, or Availability of Facilities" Between the State Prisons and County Jails.

The Appellants did not challenge the aforementioned distinction, rather they submitted several purported justifications for it. Initially, Appellants argue that State Prisons differ from County Jails with respect to purpose usage and availability of facilities and that because of these differences, it is constitutionally permissible to treat the two areas as different in law (Brief for Appellants, pp. 14-15). Even assuming that state prisons are different in fact from county jails, this proffered justification is not a viable one as it does not bear a reasonable relationship to the provisions of Section 230(3) and most assuredly does not account for any permissible distinctions between state prisoners serving identical terms of imprisonment merely because a prisoner underwent pre-sentence incarceration.

The Three-Judge Court recognized the need for any suggested justification to bear a reasonable relationship to the law when it stated:

"Nevertheless, while laws may create such distinctions and classifications, they must be related to the purposes of the law itself, and artificial distinctions not so reasonably related will not be countenanced" (Opinion of the Three-Judge District Court, Appendix, p. 59a). Bearing this requirement in mind the Three-Judge Court analyzed Section 230(3) and determined that the alleged difference in county jails and state prisons did not bear a reasonable relationship to the differences in treatment provided for in this Section. Instead the Court determined that the "over-riding consideration in the granting

of good time reductions is the maintenance of prison discipline" (Opinion of Three-Judge District Court, Appendix, p. 59a).

The same conclusion was reached by a New York State Court, even though upholding the constitutionality of Section 230(3) it found:

> "The policy underlying the discretionary grant of good time reductions is clear. The attitude and conduct of prisoners should improve if they are offered an incentive for good and productive behavior while at the same time the fact that reductions can be withheld will inhibit bad conduct."

Perez v. Follette, 58 Misc. 2d 319, 321 (Sup. Ct., Dutchess County, 1968); aff'd 31 A.D.2d 600; motion for leave to appeal dismissed as moot, 23 N.Y.2d 737, 296, N.Y.S.2d 569 (1968). See also, *Carothers v. Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970); *Colin v. New York State Parole Board*, 13 A.D.2d 555 (1961).

That good time is awarded for good conduct is evidenced in other ways as well. As recognized by the Three-Judge Court, a prisoner's maximum allowance for future good time is immediately and automatically computed and credited to an inmate's sentence upon his arrival in State Prison [Appendix, p. 60a]. This is most important for "In effect, then, a prisoner does not 'earn' good time credit as time goes on for exemplary performance in assorted prison programs but rather avoids being penalized for bad behavior" (Id.). See also, *Bitz v. Canavan*, 11 N.Y.S.2d 991 (1939); rev'd on other grounds 257 App. Div. 247; aff'd 281 N.Y. 699, 23 N.E.2d 536. The State Legislature has itself declared that the prison "board", as described in Section 235 of the Correction Law, shall have the discretion of withholding the good time allowances as:

"... a punishment for offenses against the discipline of the prison or penitentiary in accordance with the rules herein before mentioned. Reduction credited to a prisoner in the first instance, in his account, by the warden, as provided in Section 230, shall stand as the reduction allowed, unless withheld wholly or partly by the board as punishment, as above provided." New York Correction Law, §235.

That a reduction in good time allowance is a punitive device for disciplining a prisoner is also indicated by the procedures established by the Commissioner to determine whether such reduction shall occur. The possibility of withholding good time first occurs when an inmate engages in misbehavior involving danger to life, health, security or property or when an inmate persists in engaging in minor infractions to the prison rules after having been warned, counseled or reprimanded for these minor infractions. [7 N.Y.C.R.R. 251.4, 251.5]. When the aforementioned events occur a report must be filed with the superintendent describing the particular acts of misconduct. (*Id.*). These reports, along with reports of the inmates history and with a written explanation from the inmate concerning his actions, are then reviewed by the "adjustment committee", a committee composed of three employees designated by the superintendent, in order to ascertain a basic understanding of the matter. Once this review is completed the committee may take one of three possible courses of action; it may recommend reappraisal of the inmates program in the prison, it may recommend to the superintendent that the report be nullified, or it may retain control over the matter and take "adjustment committee action." [7 N.Y.C.R.R. 252.3, 252.4]. In the latter instance the committee may defer any action for a period up to three months if it is of

the opinion that the inmates attitude is satisfactory, or it may discipline the inmate by withdrawing any of his specified privileges in the jail, by confinement in his cell or by confining the inmate in a special housing unit [7 N.Y.C.R.R. 252.5]. Only when an inmate persists in failure or refusal to follow the instructions of this committee, or where the committee is of the opinion that a procedure involving formal findings and punitive sanctions are necessary, does the committee recommend to the superintendent that a "superintendent's proceeding" be held [7 N.Y.C.R.R. 252.6].

If the superintendent reasonably believes that an inmate's behavior has constituted a danger to life, health, security or property, or that an inmate has deliberately failed or has refused to follow the guidance and counseling of the adjustment committee, the superintendent may direct that a superintendent's proceeding be held [7 N.Y.C.R.R. 253.1(a)]. It is at this proceeding that formal charges are brought against the inmate, an employee of the prison is assigned to assist the inmate and a formal procedure is followed in determining whether to affirm or dismiss the charges [7 N.Y.C.R.R. 253.2; 253.3; 253.4]. If the charge is affirmed or if the inmate admits to the charge then the inmate may be disciplined by reprimand, loss of specified privileges, change of program, confinement with or without the same diet as other inmates, restitution for intentional damage, *loss of a specified period of good behavior allowance*, or referral to the adjustment committee for further action [7 N.Y.C.R.R. 253.5]. If the punishment is a loss of a specified amount of good time, this loss shall be tentative until the time when it actually affects consideration for parole at which time it shall be confirmed or modified by the commissioner [7 N.Y.C.R.R. 260.4].

The above procedures are clearly disciplinary in nature and reaffirm the Legislature's purpose of withholding good time allowances as a punishment for offenses against the discipline of the prison.

While there allegedly are basic differences between state prisons and county jails, the State Legislature has nonetheless empowered the county jails to reduce an inmate's definite sentence crediting him with ten days for each month of his sentence for efficient and willing performance of duties assigned to him. A prisoner located at a county jail is credited with good time deduction not only for the time spent after sentence but also for any pre-sentence incarceration. Correction Law, §250. Naturally these regulations apply equally to felons and misdemeants sentenced to a definite term or terms in a county jail. Here it is readily apparent that the State Legislature has deemed the authorities of a county jail to be sufficiently competent to render the commutation of an inmate's sentence and the "purpose, usage and availability of facilities" at the county jails to be sufficient for this purpose. If in fact basic and important differences exist between state prisons and county jails, as appellant suggest, the aforementioned legislative enactment apparently did not deem them to be compelling consideration when considering good time reductions.

A similar situation is presented when an inmate is transferred from a state prison to a reformatory. Correction Law §293. In this event the superintendent of the reformatory assumes all of the powers and duties assigned to the prison "board" by Section 235 of the Correction Law, including the discretionary reduction of their sentence for good conduct and efficient and willing performance of duties assigned. Additionally state prisoners who are transferred from a state prison to

Dannemora or Matteawan State Hospitals, state institutions for mental defectives, likewise receive commutation for good conduct at the same rate as state prison inmates. In this situation, the superintendent or chief officer of the institution performs the acts normally vested in the prison "board". Correction Law, §§ 246, 247. See also, 1934, Op. Atty. Gen. 456. It is quite apparent that the purpose and usage of mental institutions differ substantially from those of a state prison, yet good time reductions in sentence are still allowed.

Even within the state prison system several of the institutions differ in "purpose, usage and availability of facilities," the most noticeable difference existing between the state prisons and the state prison reception centers.[2] For example, the Ossining Correctional Facility (formally referred to as Sing Sing State Prison), presently has very limited facilities for vocational classes or industrial industries as all industrial programs are being terminated, yet inmates received at this institution, inmates who may serve a considerable amount of their sentence there, are still credited with a reduction in their sentences for "good conduct and efficient and willing performance of duties assigned." See, St. of N.Y. Executive Budget for the Fiscal Year April 1, 1970 to March 31, 1971, p. 297.

That good time is granted as an incentive for good conduct is demonstrated in other ways as well. Since 1962 the legislature authorized the statutory release of inmates held for their maximum expiration of sentence

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[2]At the present time three facilities are designated as reception centers for the state prisons: Ossining Correctional Facility, Attica Correctional Facility and Clinton Correctional Facility. [7 N.Y.C.R.R. 100.25 (c)(2); 100.5 (c)(2); 100.15 (c)(2); 103,10.]

by the Parole Board by reducing their maximum term at a rate not to exceed five days for each month of said maximum term. Correction Law §230(4). See, *People ex rel Stark v. Deegan*, 56 Misc. 2d 567, 289 N.Y.S.2d 285 (Supp. Ct., Westchester Co., 1968). On September 1, 1967 the legislature authorized the conditional release of inmates sentenced under the Revised Penal Law and held for their maximum term by the Parole Board at a rate not to exceed ten days for each month of said maximum term. Correction Law, §803. In 1967 by Section 230-a of the Correction Law the right to earn conditional release at a rate of ten days per month of the maximum term was extended to all old penal law inmates who were eligible to earn a reduction of five days per month for statutory release. In all of these instances pre-sentence jail time is included in the computation of a prisoner's good time allowance despite any alleged difference between county jails and state prisons. See, also, *Royster v. McGinnis*, ___F. Supp.___ (S.D.N.Y., January 21, 1971) (Appendix, p. 30a).

Lastly, the legislative intent was readily apparent with the repeal of Section 230(3) [repealed L. 1970, C 476; §45, eff. on the 60th day after May 8, 1970] and the subsequent passage of Sections 803 and 805 of the Correction Law and Sections 70.30 and 70.40 of the Penal Law [added L. 1967; C. 680; §147, eff. September 1, 1967].[3] Under this new statutory scene, good time earned on the minimum sentence is abolished, and presently all prisoners appear before the Parole Board at

[3] The repeal of Section 230(3) limits the scope of this case as the contested law applies only to prisoners convicted of an offense committed prior to September 1, 1967, the effective date of the aforementioned enactments. The class has been further reduced by Chapters 343 & 344 of the Laws of 1972 which added section 212-a.

the expiration of their minimum term[4] notwithstanding the amount of county jail time accumulated prior to sentencing or the amount of good time earned. Good time credit, including good time computed on the period of a prisoner's presentence incarceration, is now deducted from an inmate's maximum term of imprisonment in determining his statutory release date. .Because of these recent changes in the law, the discriminatory practices herein contested no longer exist with regard to prisoners sentenced on offenses committed after September 1, 1967.

For the aforementioned reasons we submit to this Court that whatever differences may exist between the county jails and the state prisons, they are not reasonably related to the purpose of Section 230(3) and consequently should not influence its application. Furthermore, it does not appear that county jails differ significantly from state prisons, at least not to a degree which

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[4] Prior to September 1, 1967 the State Legislature directed the Courts to impose both a minimum and maximum sentence upon indeterminate terms of imprisonment. Former Penal Law, §2189. This provision was amended pursuant to Section 70.00(3)(b&c) of the Revised Penal Law directing that the Court impose a minimum sentence only in unusual circumstances and in such a case the minimum must not exceed one-third of the maximum and the Court must state clearly on the record the reasons for imposing a minimum. In all other situations the minimum is fixed by the State Parole Board in accordance with Section 805(2) of the Correction Law. See, also, 7 N.Y.C.R.R. 1.10. "The purpose of the change is to assure the chance of a substantial period of parole supervision by eliminating the possibility of sentences that do not have an adequate spread between parole eligibility date and maximum expiration date." Penal Law, §70.00(3)(b&c), Practice Commentary.

would justify discrimination against an inmate incarcerated in one institution over the other. It should be recognized that both institutions are under the supervision of the Department of Correction and the Commissioner of Correction. Specifically Section 46(7-a) of the Correction Law [as amd. by L. 1965, Ch. 706 2nd L. 1966, Ch. 413] directs that the State Commission of Correction shall:

> "Promulgate rules and regulations establishing minimum standards for the care, custody, correction treatment, supervision, discipline, and other correctional programs for all persons confined in local correctional institutions. As used in this subdivision, 'local correctional institutions' shall mean and include all county jails. . . ."[5]

It is important to note that this section specifically refers to all persons confined in a local correctional institution and "*charged with or convicted of crime*" (Emphasis added); consequently, the activity of an inmate awaiting trial or sentencing is encompassed by this section.

The Commissioner of Correction is aware of the need for rehabilitative treatment at the local correctional level and has promulgated rules for these institutions [See, 7 N.Y.C.R.R. 5101.1].

The Commissioner has defined correctional treatment on this level as consisting "of any institutional activities or services which would help prisoners develop a more

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[5]For many years prior to the enactment of Section 46(7-a) of the Correction Law, *supra*, the State Commission of Correction has issued minimum standards for the care, custody, supervision and discipline of inmates in county jails in the form of a booklet entitled, *Regulations for the Management of County Jails.* 7 N.Y.C.R.R. 5101.1.

favorable attitude toward authority, better ability to get along with others, and more acceptable ways of making a living" [7 N.Y.C.R.R. 5101(d)(1)]. In instituting any rules or regulations the Commissioner, while recognizing the need for uniformity, mandated that the standards for rehabilitative treatment should not be arbitrary, but should be adaptable to the needs of the prisoners, the physical layout of the institution and personnel available. [7 N.Y.C.R.R. 5101.1(d)(2)].

Pursuant to the Commissioner's directives there are rehabilitative programs in the county jails in the four major areas of recreation programs, libraries, vocational and academic instruction, and counseling and guidance programs. [See, 7 N.Y.C.R.R. 5101.4] Among the Commissioner's rules are regulations governing the good behavior allowances against definite sentences [7 N.Y.C.R.R. 5100.16]. See, also, Penal Law, 70.30(4)(b), and Correction Law, §804], rules governing the discipline of the inmates [7 N.Y.C.R.R. 5100.15], and rules concerning the employment of inmates.[6] Lastly the Commission of Correction oversees

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[6] "... In a county jail although prisoners other than those serving sentence cannot be compelled to work under the law, they may be permitted to do so if they so desire. A certificate to the effect that each such prisoner has volunteered for work assignments should be obtained, dated, witnessed and kept on file...." [N.Y.C.R.R. 5100.14]. The practice in county jails should be compared with that of the state prisons where, between 1968 through 1969, only 3,090 inmates out of the state institution's population of 13,738 inmates were employed in the rehabilitative Correctional Industry. Similarly, out of the same population, only 4,900 inmates were participating in academic courses and only 2,890 inmates were participating in vocational courses. [N.Y. Executive Budget for the Fiscal Year April 1, 1970 to March 31, 1971, p. 292].

the operation of county jails by regularly visiting and inspecting such facilities [7 N.Y.C.R.R. § 51.00.1] and by requiring that annual reports be filed with the Commission by the wardens of county jails and the superintendents of county penitentiaries [7 N.Y.C.R.R. 5100.24].

That rehabilitative facilities are available in county jails is best exhibited by the programs in existence at the Nassau County Jail, the jail where both plaintiff-appellees, Rutherford and Royster, were incarcerated prior to being sentenced. At this institution many programs are available including, *inter alias*, remedial reading courses, academic courses for all levels through high school, college correspondence courses, group therapy for narcotic rehabilitation, various recreational programs, auto mechanics, art classes, music classes, typing classes, creative writing classes, Alcoholics' Anonymous and Gamblers' Anonymous programs and library facilities. *Sheriff's Department, Nassau County, Annual Report, 1970*, pp. 43, 48-51.

All of the aforementioned programs are available to inmates awaiting sentence as well as sentenced inmates (*Id.*). Sentenced inmates, however, received good time reductions on the time spent in pre-sentence incarceration at this institution, while inmates of the same institution who are ultimately sentenced to a term of imprisonment in a state prison do not receive the same consideration. We submit that this different treatment cannot be justified by any difference in "usage, purpose or availability of facilities" between the state prisons and the county jails.

B. The Granting of Good Time Reductions for the Period of Pre-sentence Incarceration Does Not Undermine the Effectiveness of the State Parole Board.

In conjunction with the argument that basic differences exist between state prisons and the county jails, appellants have further presented the argument that a prisoner's minimum release date must be based solely on the personal evaluation of a prisoner's conduct by the State Parole Board while he is actually confined in their custody [Jurisdictional Statement, pp. 10-11; Brief for Appellants, pp. 18-20; 26-27]. Quite apparently the appellants' concern is that the Parole Board needs sufficient time in which to evaluate an inmate's conduct, and that any good time credit computed on the period of a prisoner's pre-sentence incarceration would jeopardize the efficient performance of the Parole Board's duties.

We submit that this argument is without merit for the following reasons. In the first place, the reduction of an inmate's sentence for good conduct does not automatically vest the prisoner with the right to be released into society at an earlier date. Instead the purpose of the computation of a prisoner's sentence, including remission for good time, is to determine when an inmate is allowed to appear before the Parole Board for the first time to be considered for parole. It must be realized at the outset that parole is not granted as a reward for good conduct within the confines of a prison. As the Parole Board itself has stated:

> "An inmate of a correctional institution is not released to parole by the Parole Board merely as a reward for good conduct or efficient performance of duties assigned in the institution. An inmate is

paroled by Board action only if the Board of Parole is of the opinion that there is a reasonable probability that, if the inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society." *Facts and Figures About the Activities of the Board of Parole and the Division of Parole and Community Services of the New York State Department of Correctional Services* (January 1, 1971 to December 31, 1971) (hereinafter referred to as: *Facts and Figures-Parole Board,*) p. 8. See, also, Correction Law, §213.

In regard to the Parole Board's need for sufficient time to evaluate a prisoner, the granting of good time credit for pre-sentence incarceration has little if any effect on this. Initially, the granting of this good time would only minimally reduce the time before an inmate has his first opportunity to appear before the Parole Board [Appendix, p. 63a-64a]. Once the inmate appears before the Parole Board it will decide whether the inmate has been incarcerated for a sufficient time. Additionally, the Parole Board has the inherent power to refuse to release a prisoner if it is of the opinion that an inmate is not a fit subject for parole or that it has had insufficient time for evaluation.[7] Correction Law, §212, 213; *Royster v.*

[7] This power is exercised quite frequently as exhibited by the following table appearing in *Facts and Figures-Parole Board, supra,* p. 10:

INMATES	1970	1971
Total number appearing at parole hearings	7,950	7,650
Eligible for release to community	5,741	5,901
Number approved for release	3,970	4,152
Percent approved for release	69.2	70.4

McGinnis, supra, ___F. Supp.___. [See, also, Appendix, pp. 63a-64a].

The Three-Judge Court was well aware of this discretionary power vested in the Parole Board, stating that:

> "... The awarding of good time in and of itself in no ways compels the Parole Board to release a prisoner before it has had sufficient time to evaluate him and insure itself of his amenability to parole. Indeed, it is quite possible that, even if a prisoner had been under the careful eye of state prison authorities for the entire period of his incarceration and had earned good time credit throughout such period, the Board might still feel that he should not be released (and, in fact, would not have to release him) at the time of his minimum parole date. Thus, while the Parole Board's actual decision to release a prisoner on parole should certainly be based on adequate personal observation and evaluation by the releasing officials themselves, the mere decision to award a prisoner good time for time spent in county jail need not be so based since the granting of good time (whether for time served in jail *or* prison) is simply not synonymous with actual release from prison—at least in the case of minimum release..." (Appendix, p. 63a-64a).

Appellant's argument appears also to misconstrue the fundamental nature of parole as a vitally important rehabilitative tool. The Parole Board does not operate in a vacuum; instead, it completes a thorough analysis of each individual case brought before it. Section 211 of the Correction Law enumerates specifically the information which the Board of Parole must have before it when considering an inmate. "Some of this information comes to the Board by way of reports from the institution where the inmate is confined. Much of it, however, is in

the form of a parole or classification report prepared by Field Parole Officers in which is presented verified information regarding the inmate's personal and family history, the attitude of the community toward the inmate, and his prospective home and future employment." *Facts and Figures-Parole Board*, supra, p. 14. It is only after this analysis that the Parole Board decides whether or not to release an inmate on parole—a parole that is "intended not to shorten sentences but to make sentencing more effective by discontinuing prison treatment when it no longer corrects, and substituting a supervised and guided life in the everyday world of which the offenders will ultimately become free members."[8] *Facts and Figures-Parole Board*, supra, p. 7.

The limited effect that the granting of good time reduction for pre-sentence incarceration would have upon the Parole Board is further evidenced by other situations which reduce the amount of time in which the Parole Board may evaluate a prisoner's conduct, yet these apparently have not undermined the effectiveness of the Board. For instance, it is uncontested that if a state prisoner is returned to a county jail in connection with court appearances on post-conviction writs of *coram nobis* they are granted good time credit for such county jail time as well (Appendix, p. 68a, fn. 9). Presumably this practice also envisions stays in county jails for other

[8] The Legislature recognized the vital rehabilitative function of parole when it empowered the Parole Board with the duty of fixing the minimum period of imprisonment for an inmate receiving an indeterminate sentence. Penal Law, § 70.00(3)(c). Section 805(2) defines the manner in which such minimum term is determined and also provides that the Parole Board may at any later time reduce this minimum period provided that the period shall in no case be reduced to less than one year. See, also, 7 N.Y.C.R.R. 1.7, 1.8.

post-conviction relief. Similarly, Sections 246, 247 and 66 of the Correction Law provide for the granting of good time credit for the period of time that a prisoner has been transferred to any reformatory, state institution for mental defectives, or work training program. Even though these examples present situations where inmates have been removed from the custody of the Parole Board, good time credit, nevertheless, continues to be granted during the prisoner's absence from state prison.

C. The Three-Judge District Court Correctly Determined the Reasons for Awarding Good Time Reductions.

Appellants further contend that the Three-Judge Court, in failing to accept its proffered justifications, has completely ignored the equal protection standards set forth by this Court and has instead imposed its own standards for determining whether persons receive equal protection under Section 230(3) of the Correction Law by substituting its judgment for that of the New York Legislature [Brief for Appellants, pp. 22-27]. We submit that this proposition is unsound and does not find support in the opinion of the Three-Judge Court.

The Three-Judge Court, correctly delineated its responsibility in a case of this nature by providing:

> " 'It is true that the Equal Protection Clause requires only that the State's action be rationally based and free from invidious discriminations.' *Dandridge v. Williams*, 397 U.S. 471, 487 (1969). Indeed even though a state's practice may be discriminatory and substantially harm those who are the subject of the discrimination, the practice may still be constitutionally permissible if it serves a valid governmental objective. Thus, for example, although

the requirement of bail pending trial substantially discriminates against the indigent defendant, such a classification of 'jail versus bail' is constitutionally sanctioned by the Eighth Amendment as a reasonable means for insuring a defendant's appearance in Court. See, e.g., *Morris v. Crumlish*, 239 F. Supp. 498 (E.D. Pa. 1965). Nevertheless, while laws may create such distinctions and classifications, they must be related to the purposes of the law itself, and artificial distinctions not so reasonably related will not be countenanced" (Appendix, pp. 58a-59a).

Having laid the groundwork for their determination, the Three-Judge Court then conducted a thorough examination of defendant's suggested justifications. Such examination is necessitated by the procedure employed by other courts considering various cases raising questions of equal protection. *Dandridge v. Williams*, supra, 397 U.S. at 482-487; *McGowan v. Maryland*, 366 U.S. 420 (1961); *Palmer v. Thompson*, 403 U.S. 217, 224-225 (1971); *Briggs v. Kerrigan*, 431 F.2d 967 (1st Cir. 1970); *Boddie v. Wynn*, 434 F.2d 1207 (2nd Cir. 1970). As this Court stated in *Cohen v. Hurley* [366 U.S. 117 (1961), rehearing denied, 374 U.S. 857, rehearing denied, 379 U.S. 870]:

"Whatever procedures are fair, what state process is constitutionally due, what distinctions are consistent with equal protection all depend upon the particular situation presented. . . ."

After considering at length the facts before it, the Three-Judge Court analyzed the purported justifications for discrimination among individuals under the purview of Section 230(3) of the Correction Law and, after commenting extensively on these, rejected them as unsubstantiated by the evidence. [Appendix, pp.

60a-64a]. Instead of attempting to 'second-guess' the motivation behind the Legislature's enactment, the Three-Judge Court was concerned with the actual effect of the law as employed within the penal system of this state. Finding that Section 230(3) is used as a disciplinary measure, the Three-Judge Court properly determined that the particular time or place of an inmate's incarceration is irrelevant to a determination of his maximum good time allowance.

II.

THE COURT BELOW PROPERLY TREATED THE CASE AS AN ACTION UNDER THE CIVIL RIGHTS ACT (42 U.S.C. 1981, 1983). APPELLEES WERE NOT REQUIRED TO EXHAUST ANY STATE REMEDIES.

In his argument (Point II Appellant's Brief) the Attorney General urges appellees' action under 42 U.S.C. 1981—The Civil Rights Act, should have been treated as a habeas corpus petition and dismissed for failure to exhaust state remedies. This position is without merit.

Obviously, a petitioner may not circumvent the exhaustion requirements of 28 U.S.C. §2254 by labeling a habeas petition a Civil Rights Action, and the string of cases cited by the appellant support this statement, but by the same token they do not support his argument that this Civil Rights Action was a disguised habeas. *Grayson v. Montgomery*, 421 F.2d 1306 (1 Cir. 1970) involved a challenge to a commitment because of a lack of counsel at a parole hearing. In *Smartt v. Avery*, 411 F.2d 408 (6th Cir. 1979) the plaintiff alleged he was forced to waive his right to appeal and unsuccessfully sought relief under the Civil Rights Act claiming he was not asking for immediate release but only for release if the state did not

offer him an appeal. The 6th Circuit rejected the claim holding the difference claimed was of degree and not kind. In *Bennett v. Allen*, 390 F.2d 788 (9th Cir. 1968) the state prisoner challenged his guilty plea and claimed he was entrapped. *Johnson v. Walker*, 317 F.2d 418 (5th Cir. 1963) was an attack of a state judgment of conviction based upon a claim of an illegal search and seizure. In *Duncombe v. New York*, 267 F. Supp. 103 (S.D.N.Y. 1967) the complaint challenged a state conviction for desecrating the flag and in *Lombardi v. Peace*, 259 F. Supp. 222 (S.D.N.Y. 1966) the plaintiff did not raise a sufficient jurisdictional claim or alternatively set forth allegations which were more properly the subject of a criminal appeal.

In the present action plaintiffs' make no claim with regard to the validity of their state convictions and seek neither release from custody nor redress of civil rights violations incurred during the course of the state criminal proceedings. Indeed, the favorable ruling below secures only an earlier hearing before the Parole Board which still retains the non-reviewable discretion to refuse parole. See, *United States ex rel Cambell v. Pate* 401 F.2d 55, 57 (7th Cir. 1968).[9]

Appellees' motivation in bringing the present action is quite clearly to obtain their ultimate release from custody, albeit, even if it be on parole. But, contrary to the appellant's assertion (Appellant's Brief p. 28) the reason for bringing the action does not control the type of law suit to be brought.

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[9] While in a different setting this case too involved the time a state prisoner had to wait before he appeared before the Parole Board and the 7th Circuit held a claim cognizable under 42 U.S.C.A. 1983 was raised. See, also, *Douglas v. Sigler*, 386 F.2d 684 (8th Cir. 1967).

The claim herein is that appellees' are losing

> "... the possibility that if [they] appeared before the [Parole] Board [they] might persuade it to decide in [their] favor." *United States ex rel Campbell v. Pate*, supra at 57.

This, however, is only a *chance* for qualified freedom and as the Court below pointed out (Opinion below, ft. 7, p. 68a) is distinguishable and hardly the same as cases holding habeas to be the proper remedy where *actual* release from custody is sought. *Rodriguez v. McGinnis*, ___F.2d___ (March 16, 1971); *United States ex rel Katzoff v. McGinnis*, ___F.2d___ (March 29, 1971).

This possible deprivation of rights secured to appellees under the constitution, namely, their right to equal protection of the laws is a cause of action recognized by the Civil Rights Act. *Monroe v. Pape*, 365 U.S. 167, and though appellees are state prisoners they fall within its protection. *Cooper v. Pate*, 378 U.S. 546 and since the remedy provided by the Civil Rights Act:

> "is supplemental to the state remedy, ... the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape*, supra at 183.

Appellant also cites *Wilwording v. Swenson*, 404 U.S.___; 30 L. Ed. 2d 418 and *Picard v. O'Connor*[10] 404 U.S.___; 30 L. Ed. 2d 438 to support his position. We think the contrary.

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[10] Picard deals with the failure of a state prisoner to raise with specificity in the state courts the constitutional claim he raised on his federal habeas corpus petition and has no relevance to the present appeal.

In *Wilwording*, a suit challenging living conditions and prison discipline, this Court did indeed hold that habeas corpus was a proper remedy[11] but the Attorney General ignores the second part of the Opinion which holds that petitioner's pleading may also be read to plead a cause under the Civil Rights Act.

It seems clear, then, that any possible extension of habeas jurisdiction by *Wilwording* (See, also, *Johnson v. Avery*, 393 U.S. 483) was not at the expense of the jurisdiction of the Federal Courts under the Civil Rights Acts.

Appellees set forth claims cognizable under the Civil Rights Act; their action was, therefore, properly brought for though state prisoners they are not held to any stricter standard of exhaustion than other Civil Rights plaintiffs. *Wilwording v. Swenson*, supra; *Houghton v. Shober*, 392 U.S. 639.

CONCLUSION

James Royster and Percy Rutherford, individually and on behalf of all persons similarly situate, plaintiffs-appellees, have herein established that the District Court correctly determined that the denial of good time reductions upon a New York State prisoner's period of pre-sentence incarceration contravenes and is in violation of the Equal Protection of the Laws Clause of the Fourteenth Amendment to the Constitution of the

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[11]The Court also held defendant had satisfied the exhaustion requirement even though petitioner had not invoked various state alternatives to obtain relief on the theory that (1) these alternatives were conjectural and (2) the lack of probability of relief in the state courts.

United States, and that the plaintiffs-appellees presented before this Court a cognizable claim under the Civil Rights Act, and respectfully pray the decision of the United States District Court, for the Southern District of New York, be affirmed.

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